

**JAMES WOODS,**  
*Complainant,*

v.

**Chancellor, UNIVERSITY OF  
WISCONSIN - Madison,**  
*Respondent.*

**RULING ON  
COMPLAINANT'S  
PETITION FOR  
REHEARING**

Case No. 98-0224-PC-ER

The Commission dismissed the above-noted case for untimely filing by ruling dated May 5, 1999 (hereafter referred to as the Prior Ruling). The complainant filed a petition for rehearing on May 27, 1999. Both parties have had an opportunity to file written arguments.

The facts recited below appear to be undisputed by the parties unless specifically noted to the contrary.

**FINDINGS OF FACT**

1. Mr. Woods filed a "Discrimination Complaint Fair Employment" with the Department of Workforce Development (DWD) on December 16, 1998. DWD wrote to him by letter dated December 17, 1998, stating as shown below (in relevant part):

Your complaint of discrimination . . . was received in our office on December 16, 1998. However, this office does not have jurisdiction to investigate employment discrimination complaints filed by state employees.

Your complaint is being forwarded to the State Personnel Commission . . .

2. On December 18, 1998, the State Personnel Commission (hereafter, the "Commission") received the complaint Mr. Woods filed with DWD. The Commission provided him with an opportunity to "perfect" the filing (resubmitting same using Commission forms and procedures). The perfected complaint was received by the Commission on December 23, 1998.

3. Mr. Woods alleged in the perfected complaint that respondent discriminated against him because of his disability in regard to harassment, a failure to accommodate his disability and the termination of his employment.

4. Respondent hired Mr. Woods on March 16, 1997, with the requirement that he serve an original probationary period. Terry Snowden was his supervisor. The probationary period was extended twice because (according to Mr. Woods) he had pending requests for accommodation of his disability.

5. Mr. Snowden informed complainant on February 19, 1998, that he was terminated effective immediately. Mr. Woods still was serving his probationary period on the day he was terminated. Mr. Woods described the events of February 19<sup>th</sup>, in his letter dated March 18, 1999 (pp. 2-3) as shown below:

Based upon my notes, here is my recollection of what took place the evening of February 19, 1998.

I was finishing up my work for the day at the SRC building just a little past 9 p.m. I had been working in the upper level of the SRC building. I turned off the hall and unoccupied office lights before I took my mop bucket down the elevator to empty and rinse out the bucket as well as rinse the mop. All I had left to do was to put away the "wet floor" sign in the upper level hallway.

While I was downstairs, I spoke briefly with Roger Hansen, who works at the SRC, before I walked up the stairs to put the "wet floor" sign away. Just after I placed the "wet floor" sign into the pipe closet where it is stored, and closed the door, I saw Mr. Snowden at the far north end of the upper level SRC hallway. He was looking into Mr. Hansen's office, which I had waxed that evening.

Mr. Snowden then walked down the hallway very quickly. He said something about the time, which by now was about 9:18 p.m. I replied that I had to (sic) nothing to speak about until Anne Habel was physically present. This is a right guaranteed to me by the 1975 U.S. Supreme Court Weingarten decision as well as the collective bargaining agreement between the WSEU and the State of Wisconsin. Ms. Habel had informed me previously that as a probationary employee, I was entitled to this legal protection . . .

Mr. Snowden then said, "Will you at least listen to me?" He then said something about the university having certain obligations which include complying with safety laws to ensure a safe workplace and also to ensure that

wage and hours laws are followed. He further said that the time I worked that night past 9 p.m. was time that I was entitled to be paid for, but was not time authorized. He further said that he had seen me in the SRC many nights past 9 p.m., but gave no specific dates . . .

I replied that I had not been requesting pay for the time I had worked past 9 p.m., so it really should not be an issue. I also reminded him that I could not discuss the issue without a union steward physically present. "Do you see Anne Habel around?" I asked. "I don't, so we can't discuss this now."

Mr. Snowden replied, "Well you're not going to have her here tonight."

Mr. Snowden wanted to continue the conversation, and he was raising his voice more and more as this short discussion progressed. This incident took place in the SRC lobby between the main entrance doors and the control room . . .

Mr. Snowden then yelled in a very loud voice, "Listen to me." Again, I said I had nothing to discuss. Next, he demanded, "Give me your keys." As I handed him my keys, I asked him how I would get into the Physical Sciences Laboratory building where my jacket, lunch box and personal things were. He said he would let me in the door.

Next I asked, "What about tomorrow?" Mr. Snowden's response: "You're through." He then escorted me to my desk in the maintenance break area at the PSL where he demanded, again in a very loud voice, "Pack up your stuff. All of your stuff." He stood over me watching the way a police officer might. Finally, he escorted me out to the parking lot .

6. The Commission in the Prior Ruling (pp. 2-3) discussed the 300-day period relevant to this case, as noted below:

Discrimination complaints must be filed "no more than 300 days after the alleged discrimination . . . occurred," pursuant to §111.39(1), Stats. The most recent action of which Mr. Woods complains is his termination, which occurred on February 19, 1998. The 300-day period began on February 20, 1998, and ended on December 16, 1998.

Mr. Woods filed a discrimination complaint on December 16, 1998, but he filed it with DWD rather than with the Commission. Mr. Woods asks the Commission to find that his complaint was timely based upon his filing with DWD. The Commission's administrative rules, however, define "filing" as the

“physical receipt of a document” at the Commission’s office.<sup>1</sup> See §PC 1.02(1), Wis. Adm. Code. Also see *Radtke v. DHFS*, 97-0068-PC-ER, 6/19/97; *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97; and *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96.

Mr. Woods claims he was “completely unaware” that he needed to file his discrimination complaint with the Commission instead of with DWD. The Commission first notes that his statement is suspect. Attached to his complaint is a letter from respondent dated March 3, 1998, which specifically informed him that “complaints of harassment” would need to be filed “with the appropriate external resources, i.e. EEOC, Personnel Commission, etc.” Of further note, the Commission consistently has held that ignorance of the law does not operate to extend the 300-day filing period. See, for example, *Gillett v. DHSS*, 89-0070-PC-ER, 8/24/89; *Masko v. DHSS*, 95-0070-PC-ER, 8/24/89; and *Holmes v. UW-Madison*, 97-0037-PC-ER, 4/24/97.

#### CONCLUSIONS OF LAW

1. It is complainant’s burden to establish entitlement to rehearing.
2. Complainant failed to meet his burden.

#### OPINION

Petitions for rehearing are governed by §227.49, Stats., the pertinent portion of which is shown below:

(3) Rehearing will be granted only on the basis of:

- (a) Some material error of law.
- (b) Some material error of fact.
- (c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

Complainant raised many arguments in his petition for rehearing. All were considered by the Commission and rejected. Discussion follows regarding the major arguments raised by complainant.

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<sup>1</sup> Respondent’s contention that the present complaint was not filed until February 23, 1998 is incorrect. February 23<sup>rd</sup> is the date the Commission received the perfected complaint and such filing relates back to the date the Commission received the initial complaint which was on February 19, 1998. See §PC2.02(3), Wis. Adm. Code. Also see, *Goodhue v. UW-Stevens Point*, 82-PC-ER-24, 11/9/83.

The complainant contends that the Commission's Prior Ruling was based on a material error of law. Specifically, he contends he was unaware that he should have filed his complaint with the Commission rather than with the Department of Workforce Development (DWD). The Commission made the following observation in the Prior Ruling:

Mr. Woods claims he was "completely unaware" that he needed to file his discrimination complaint with the Commission instead of with DWD. The Commission first notes that his statement is suspect. Attached to his complaint is a letter from respondent dated March 3, 1998, which specifically informed him that "complaints of harassment" would need to be filed "with the appropriate external resources, i.e. EEOC, Personnel Commission, etc." Of further note, the Commission consistently has held that ignorance of the law does not operate to extend the 300-day filing period. See, for example, *Gillett v. DHSS*, 89-0070-PC-ER, 8/24/89; *Masko v. DHSS*, 95-0070-PC-ER, 8/24/89; and *Holmes v. UW-Madison*, 97-0037-PC-ER, 4/24/97.

Complainant, in his petition for rehearing, continues to claim that he was unaware that his complaint should have been filed with the Commission rather than with DWD. His arguments did not address the fact that respondent specifically informed him by letter dated March 3, 1998, that his filing should be with the Commission and, as a result, his arguments are unpersuasive.

Complainant also contends that the Commission's Prior Ruling was based upon a material error of law because the Commission held that ignorance of the law does not toll the filing period. He urges the Commission to adopt a "reasonable person" standard and find that his complaint was timely filed because a reasonable person would have filed with DWD rather than with the Commission. The result, however, is the same using a reasonable person standard. Respondent informed complainant by letter dated March 3, 1998, that the Commission was the appropriate place to file. A reasonable person would not have ignored this information.

Complainant further contends that the Commission's Prior Ruling was based upon a material error of law because the Commission commenced the limitations period on February 19, 1998, the date he was told by Mr. Snowden, his supervisor and the alleged discriminator, that he was terminated effective immediately. Complainant contends the limitations period

did not commence until at least February 23, 1998, when respondent's personnel officer, Clay Vinje, prepared the official termination letter and mailed it to complainant. He contends that it "is a requirement statewide for all probationary classified employees" that the employer must provide a written explanation of the reasons for termination. He further contends that the termination of a probationary employee is not official until this is done.

Complainant is correct that as a probationary employee in the civil service system, he is entitled to written notice of the reasons for his dismissal. See §ER-MRS 13.08(2), Wis. Adm. Code.<sup>2</sup> The cited code section, however, does not indicate that termination by oral notice is ineffective until the later receipt of written notice of the reasons for dismissal. Accordingly, the code section does not answer the question of when the statute of limitations began to run in his case.

The Court of Appeals has held that discrimination occurs "when the employer acts and the employee knows about it." *Hilmes v. DILHR*, 147 Wis. 2d 48, 50, 433 N.W.2d 251 (Ct. App. 1988).<sup>3</sup> The *Hilmes* decision in effect overruled the Commission's decision in *Latimer v. UW-Oshkosh*, 84-0034-PC-ER, 11/12/84, where the Commission held that in a non-tenure denial case, the operative date for limitations purposes was the cessation of employment, not the earlier date when the decision was made and communicated to the complainant.

Written notice is not required to commence the limitations period as noted in the following excerpt from 45B Am Jur 2d *Employee's Notice of Discriminatory Act* §1289:

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<sup>2</sup> The text of §ER-MRs 13.08(2), Wis. Adm. Code is shown below:

Dismissal notice required. When a probationary employee is to be dismissed, the appointing authority shall immediately provide written notice to the employee to be dismissed of the reasons for dismissal, the date on which dismissal is to occur, and that the employee may be restored to the register from which he or she was appointed, if it still exists, upon request to and with the approval of the administrator pursuant to §230.28(3), Stats. A copy of such notice shall be sent to the administrator. An employee who has permanent status and is dismissed while on a probationary period under the provisions of §ER-MRS 14.03 or 15.055, shall also be notified whether or not the employee will be restored to the employee's former position, or to a position assigned to a class having the same pay rate or pay range maximum, or to a position in a class assigned to a counterpart pay rate or pay range.

Title VII's charge filing period starts to run when the employee receives notice from the employer that the personnel decision that the employee claims to be discriminatory has been made.

The question frequently arises as to what sort of notice is sufficient . . . Express written notice from the employer is not required. However, the notice must embody a final expression of the employer's decision and cannot be tentative or equivocal . . .

Additional guidance on this point is found in 45B Am Jur 2d *Employee's Imputed Knowledge of Discriminatory Act* ¶1290, where the following illustration is given:

*Illustration:* A notice to an employee that he is terminated immediately constitutes an obvious objective manifestation of the employer's intent, and the fact that the employee is kept on the payroll after that date to collect vacation benefits or severance pay does not mean that he is terminated only when actually separated from the payroll. The employee knew or should have known that he was terminated on the date of notice.

The events of February 19, 1998 in the present case, do not suggest that the termination was tentative or equivocal. According to complainant's own version of events (see ¶5 of the Findings of Fact) his supervisor, Mr. Snowden, asked for his keys, told him he was through when he asked about coming into work the next day, instructed him to pack up his belongings, watched while he packed his belongings and escorted him off the premises. Complainant indicated in the initial complaint received by the Commission on December 18, 1998, that the last date of discrimination happened on February 19, 1998. He further indicated in the letter attached to his complaint (letter dated December 16, 1998) that "I was terminated on February 19, 1998 by my supervisor Terry Snowden." Under the circumstances of this case, the employer acted and the complainant was aware of the action on February 19, 1998.

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<sup>3</sup> The Commission has followed *Hilmes* in prior decisions. For example, see *Haney v. DOT*, 94-0165-PC-ER, 9/24/97.

ORDER

Complainant's petition for rehearing is denied.

Dated: June 28, 1999.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served



personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95